

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 100 OF 2002

Mohammed Jaffar @ Jaffar @
Munna s/o Umar Mogal
Muslim aged 36 years
Occ: Service
R/o Dr. Baba Saheb Ambedkar Nagar
Bharat Nagar, (East),
Mumbai - 400 051
(Presently lodged in
Yarwada Central Prison, Pune) ..Appellant
(Orgiginal Accused)

Vs.

1. The State of Maharashtra
2. The Insepctor of Police, Police, Station,
Jogeshwari Mumbai. ..Respondents

Mr. M.Y. Sayani for appellant.
Mr. A.S. Shitole, APP for State.

CORAM: B.H. MARLAPALLE, J.

Date : July 10, 2007.

ORAL

JUDGMENT:

1. This appeal which was admitted on 5/3/2002
arises from the order of conviction and sentence
passed by the learned Additional Sessions Judge,
Greater Bombay in Sessions Case No. 728 of 1988 on

13/12/2001. The appellant-accused has been convicted for the offences punishable under Sections 363, 366 and 376 (2)(f) of IPC. He has been sentenced to suffer 4 years RI with fine of Rs.500/- for the first offence, 5 years RI with fine of Rs.500/- for the second offence and RI for 10 years with fine of Rs.1000/- for the third offence i.e. under Section 376 (2)(f) of IPC.

2. As per the prosecution case, the accused was staying in the neighbourhood of the prosecutrix and while he was alone in his house on 26/2/1988 he called her from the otla of house, which was opposite the door of the house of the accused, where she was sitting and at that time she was alone. After the prosecutrix entered the house of the accused, he removed her undergarment and committed rape on the prosecutrix who was of the age of 6 years. The prosecutrix shouted, but the accused had closed the door from inside. Thereafter he opened the door and sent her out of the house and at that stage the mother of the prosecutrix saw her and asked her what she was doing inside. The prosecutrix immediately disclosed

the incident that had taken place inside the house of the accused and the mother of the prosecutrix started shouting and called neighbours i.e. Rasoolbi Shaikh (PW 3), Salmabegam Shaikh and the prosecutrix was taken to the hospital, where she was checked by Dr.B.A. Damawale (PW 5) and attached to the Nagpada Police Hospital as a Medical Officer. The accused came to be arrested on the same day. During the course of investigation, the frock as well as undergarment of the prosecutrix and one lungi and one shirt of the accused were also seized and sent for chemical analyses along with the blood samples of both of them. On completion of the investigation, charge-sheet was filed.

3. In the course of the trial, the prosecution examined in all 8 witnesses, namely, the mother of the prosecutrix Smt. Abeda Ansari (PW 1), the prosecutrix herself (PW 2), Rasoolbi Shaikh (PW 3), Salmabegam Shaikh (PW 4), Dr. B.A. Damawale (PW 5), Ashok Shete (PW 6), Suresh Sonwalakar, P.C.No.1616 (PW 7) and Vasant Kharat, P.N. No. 7978 (PW 8). P.W.6 was a panch witness to the panchanama of seizure of clothes

(Exh.17) drawn on 26/2/1988 at about 5 p.m. but he turned hostile, however, he admitted to have signed the said panchanama at Exh.17, but stated that he did not remember the contents therein. The prosecution, therefore, proved the said panchanama by examining PW 8 - Vasant Kharat who was attached to the Jogeshwari Police Station along with PSI Sawant and PI Kajale was on duty from 8 a.m. to 8 p.m. on 26/2/1988 at the said police station. P.W. 7 Suresh Sonwalakar, attached to Jogeshwari Police Station has been examined to prove the seizure of the clothes of the accused and the seizure panchanama at Exh.18. The C.A. reports were also brought on record in the evidence of PW 7 and they at Exh.21. In addition, the C.A. reports at Exh.13 colly., Exh.14 and Exh.15 were brought on record in the evidence of PW 5. As per the C.A. reports the blood group of the prosecutrix is "A", whereas the blood group of the accused is detected to be "O". The C.A. report at Exh.21 indicated that the frock which was worn by the prosecutrix at the time of the incident had few semen stains ranging from 1 to 3 cms. in diameter distributed mostly on lower portion. Similarly, the undergarment worn by the prosecutrix also had few

semen stains ranging from 1 to 4 cms. in diameter distributed mostly on middle portion. The lungi which was worn by the accused at the time of the incident was also found to have few semen stains ranging from 1 to 4 cms. in diameter distributed at places. The semen stains detected on the clothes of the prosecutrix were of blood group "O".

4. The involvement of the accused in the incident

is proved by the depositions of not only the prosecutrix, but also her mother (PW 1) and the neighbours PW 3 and PW 4. The accused was a recently married man and his wife was away. No other family member was in the house and when the prosecutrix had disclosed to her mother (PW 1) the incident, while she was coming out of the house of the accused, message was sent to PW 3 and PW 4 and PW 4 stated in her depositions that she immediately went to the accused and questioned him. He had just taken bath and was drying his hair with a towel. He folded his hands and said "mujhse galati ho gayi, mujhe maaph kar do". This evidence in the examination-in-chief remained unshaken in the cross-examination of PW 4. The age of

the prosecutrix has also not been disputed by the defence.

5. The learned counsel for the accused stated that the prosecutrix who was of about 6 years of age when the incident had taken place on 26/2/1988, had stepped in the witness box after about 13 years i.e. in the year 2001 and, therefore, the details she provided do not inspire confidence to rely on her oral evidence. He also pointed out that some of the statements she made in her in-camera statement were contrary to the depositions of PW 1 and PW 5 as well as the medical certificate issued by PW 5 at Exh.12. He has also referred to the medical evidence in support of his contentions that the prosecution could not prove its case that the accused had committed an offence punishable under Section 376 of IPC on the prosecutrix, a minor girl. He referred to the medical certificate issued by PW 5 at Exh.12 and pointed out that it could prove the case of sexual assault, but it could not prove the case of rape as defined under Section 375 of IPC. He, therefore, urged that for the offence of penetration, as certified by the doctor,

there was no offence of rape that could be attributed to the accused and even if his involvement in the incident is held to be proved, his conviction and sentence for the offence punishable under Section 376 (2)(f) of IPC was required to be set aside by acquitting him under the said offence. As far as the conviction under Sections 363 and 366 of IPC is concerned, the learned counsel for the appellant has not pressed the appeal more so when the appellant has already undergone the sentence of four years and five years. It was pointed out that on pronouncement of the impugned order of conviction and sentence on 13/12/2001, the accused was taken in custody and since then he is in jail. He was also under arrest from 26/2/1988 to 17/3/1988 till he was released on bail. It is also pointed out that the fine amount imposed for all the three offences has been deposited. It is, therefore, necessary to consider a limited issue in this appeal as to whether the prosecution has proved its case that the accused is guilty of an offence punishable under Section 376 (2)(f) of IPC.

6. The medical evidence, as noted earlier, has

been brought on record by the prosecution through the evidence of Dr. B.A. Damawale. He stated that on 26/2/1988 he was on emergency duty for 24 hours and at 11.10 hrs. the prosecutrix was brought to him by Head Constable No.12319 of Jogeshwari Police Station concerned with C.R. No. 65/88 and after obtaining consent of the father of the prosecutrix and recording the history of alleged rape on 27/2/1988 at about 1.30 p.m. he examined her and found that the monarche was absent, L.M.P. absent. Mental status sound and the girl was limping while walking. He did not find any external injury over the person of the prosecutrix and the breast was infantile. He found that the labia majora was normal, clitoris was normal, vaginal mucosa was not seen. He further found that the hymen was intact and no tears were found on the same. The hymenal orifice admitted tip of little finger, the discharge was nil. There was little congestion at labia minora, measuring 0.5 x 0.5 cm. In his opinion the victim girl was about 5 to 6 years of age and she had history of polio. He also stated that he had collected the blood and vaginal swab of the victim girl and it was sent to chemical analysis. He stated that the medical findings were consistent with the

history of sexual assault and the prosecutrix was sexually assaulted and, therefore, he issued medical certificate at Exh.12 and C.A. report at Exh.13 (Colly.). Exh.12 has stated that there were no external genital injury as is clear from the contents in para 6 therein. If the medical certificate Exh.12 is read with the C.A. report at Exh.21, it is clear that there was no penetration, but there was ejaculation in the act committed by the accused with or on the prosecutrix on 26/2/1988. Apart from the testimony of the prosecutrix (PW 2), the other three witnesses i.e. PW 1, PW 3 and PW 4 had not seen the incident and the circumstantial evidence if read with the medical report as well as the report of the C.A., it is clear that the offence of rape as defined under Section 375 of IPC had not taken place as the prosecution failed to prove, on the basis of the medical evidence, that the prosecutrix was raped.

7. The learned counsel for the accused, therefore, submitted that even if the case proved by the prosecution does not come within the ambit of Section 354, undoubtedly the said offence will at the

most come within the ambit of Section 511 of IPC. He also pointed out the letter dated 1/4/2006 received from the Superintendent, Yarawada Central Prison at Pune informing him that the accused is likely to be released in January, 2008. The learned counsel, therefore, prayed for the immediate release of the accused by sentencing him for the offence punishable under Section 511 of IPC and in this regard he placed reliance on the recent decision in the case of Ramkripal s/o Shyamlal Charmakar vs. State of Madhya Pradesh **[2007 AIR SCW 2198]**. In the said case also the accused was found guilty of the offence punishable under Section 376 of IPC. The observations made by their Lordships in paras 15 and 16 in the said case are usefully reproduced as under:-

"15. An attempt to commit an offence is an act, or a series of acts, which leads inevitably to the commission of the offence, unless something, which the doer of the act neither foresaw nor intended, happens to prevent this. An attempt may be described to be an act done in part execution of a criminal

design, amounting to more than mere preparation, but falling short of actual consummation, and, possessing, except for failure to consummate, all the elements of the substantive crime. In other words, an attempt consists in it the intent to commit a crime, falling short of, its actual commission or consummation/completion. It may consequently be defined as that which if not prevented would have resulted in the full consummation of the act attempted. The illustrations given in Section 511 clearly show the legislative intention to make a difference between the cases of mere preparation and an attempt.

16. The sine qua non of the offence of rape is penetration, and not ejaculation. Ejaculation without penetration constitutes an attempt to commit rape and not actual rape. Definition of "rape" as contained in Section 375 IPC refers to "sexual intercourse" and the Explanation appended to the Section provides that penetration is sufficient to constitute the sexual intercourse necessary to the

offence of rape. Intercourse means sexual connection. In the instant case that connection has been clearly established. Courts below were perfectly justified in their view."

. The findings of their Lordships that the act of sexual intercourse was clearly established is based on the evidence of the Medical Officer (PW 7), from whose depositions it was clear that the act of sexual intercourse was proved. The medical officer had found that the hymen membrane of the victim was torn and there was fresh bleeding from slight touch and she has also found that her vaginal orifice admits one finger with difficulty.

8. Having regards to the medical evidence in the instant case, it is clear, as noted earlier, that the act of sexual intercourse by the accused in the incident with the prosecutrix could not be proved, but his attempt to have sexual intercourse with the prosecutrix has certainly been proved. The offence

punishable under Section 511 of IPC is, therefore, proved against the accused. As per the said section, whoever attempts to commit an offence punishable under the Code with imprisonment for life or imprisonment, or to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence, shall, where no express provision is made by the Code for the punishment of such attempt, be punished with imprisonment of any description provided for the offence, for a term which may extend to one-half of the imprisonment for life or, as the case may be, one-half of the longest term of imprisonment provided for that offence, or with such fine as is provided for the offence, or with both. For the offence punishable under Section 376(2)(f) of IPC the sentence prescribed is RI for a term which shall not be less than ten years but which may be for life and shall also be liable to fine. In the instant case, by the impugned order of sentence, the trial court has awarded RI for 10 years and even if the highest sentence i.e. life imprisonment for an offence under Section 376(2)(f) is taken into consideration, the sentence of seven years RI would meet the ends of justice, in my considered opinion.

9. In the premises, this appeal succeeds partly.

The order of conviction and sentence for the offences punishable under Sections 363 and 366 of IPC is hereby confirmed. The order of conviction and sentence for the offence punishable under Section 376(2)(f) of IPC is hereby quashed and set aside and instead the appellant-accused is convicted for an offence punishable under Section 511 of IPC and he is sentenced to suffer RI for a period of seven years and shall be liable to pay a fine of Rs.1000/-. In default of fine, he shall further undergo RI for six months. All the sentences to run concurrently.

(B.H. Marlapalle,J.)